83-1963

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

No. _____

BARRETT TOAN, Director, Missouri Department of Social Services and JAMES MOODY, Director, Missouri Division of Family Services,

Petitioners,

v.

LUCINDA CUNNINGHAM, through her next friend, ISABEL CONNER, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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46 pp

QUESTION PRESENTED

1. Whether Petitioners' practice of automatically regarding a minor parent's Old Age, Survivor and Disability Insurance (OASDI) benefits, paid to a representative payee, as income available to the minor parent's dependent child in determining the dependent child's eligibility and grant amount under the state's Aid to Families with Dependent Children (AFDC) program is in conflict with regulations promulgated under the Social Security Act, 42 USC §401 et seq. (1976 & Supp. V 1981), and therefore invalid under the supremacy clause.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered March 1, 1984.

OPINIONS BELOW

The opinion of the court of Appeals (App. A, infra) is not reported. The opinion of the district court (App. B, infra) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra) was entered on March 1, 1984. The jurisdiction of this Court is invoked under 28 USC 1254(1).

REGULATIONS INVOLVED

1. 45 CFR §233.20(a)(3) provides in relevant parts:

> (ii)(D) Net income, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such

sum available for support and maintenance....

and

(vi)....In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21, except that, under the AFDC plan, if a spouse or parent is receiving SSI benefits under title XVI, then, for the period for which such benefits are received, his income and resources shall not be counted as income and resources available to he AFDC unit....

2. 20 CFR §404.2035 provides in relevant part:

A representative payee has a responsibility to--

(a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary.

3. 20 CFR §404.2040 provides in relevant part:

(a) Current maintenance. We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

(b) ....

(c) Support of legal dependent. If the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent spouse, child, and/or parent.

(d) ....

STATEMENT

Lucinda Cunningham, individually and on behalf of a class, filed her complaint on November 3, 1981. The named Defendants, Petitioners herein, were Barrett Toan and James Moody, who as Directors of agencies of the State of Missouri, are responsible for administering the AFDC program in Missouri.

The alleged class consisted of AFDC mothers below the age of 18 who receive, through a representative payee, Social Security benefits. Plaintiffs challenged Defendants' practice of including in the determination of eligibility and the grant amount of AFDC the Social Security benefits paid to the representative payee. The District Court issued a preliminary injunction on behalf of the named Plaintiff on December 16, 1981.

On February 1, 1983, Defendants filed a Motion for Summary Judgment and a Motion for Class Certification. Defendants on February 3, 1983, filed a Motion for Joinder of the Secretary of the Department of Health and Human Services as a party defendant. On February 24, 1983, a hearing was held on the Motion for Class Certification. On March 2, 1983, the Court denied Defendants' Motion for Joinder. On March 24, 1983, the Court certified a class. On April 25, 1983, the

Court entered its final order and judgment on behalf of Plaintiffs and enjoined Defendants from counting Plaintiffs' Social Security benefits paid to a representative payee as available income to Plaintiffs' dependent children when determining AFDC eligibility and grant amount, except to the extent that these Social Security benefits are actually paid to the needs of the dependent child. On appeal the United States Court of Appeals for th Eighth Circuit affirmed the order and judgment of the District Court.

Plaintiff Lucinda Cunningham, who is 16 years old, applied for AFDC benefits shortly after the birth of her son on July 13, 1981. Plaintiff Cunningham is a beneficiary of Social Security benefits paid based on the earnings of her disabled father, and the amount of these benefits was $183.10 per month from July 1, 1981, to June 30, 1982. Effective July 1, 1982, the amount of these

benefits was increased to $196.00 per month. Prior to July 1, 1982, Plaintiff Cunningham's Social Security benefits were actually paid to her mother as representative payee. In March 1982 Plaintiff Cunningham's mother became ill and entered a nursing home. From March 1982 to and including August 1982 Plaintiff Cunningham resided with her son and no other person in St. Louis, Missouri. Effective July 1, 1982, Isabel Conner was appointed as representative payee for Cunningham's Social Security benefits.

On August 19, 1981, the Missouri Division of Family Services approved Plaintiff Cunningham for an AFDC grant in the amount of $21.00 per month. Plaintiff Cunningham requested a fair hearing regarding the amount of her AFDC grant, and on October 16, 1981, Defendant Moody issued a decision which held that Plaintiff's OASDI benefits should be

considered as income to herself and her son in calculating her AFDC benefits.

Defendants calculate the income of the applicants, in this case mother and daughter, and compare it to the State's standard of need. If the applicant's income is below the standard of need, then Defendants pay a percentage of that need as the amount of the grant. In the case of Social Security benefits paid through a representative payee, Defendants include that as income to the parent when it is included in the calculation.

REASONS FOR GRANTING THE PETITION

I.

The court below has decided an important question of federal law which should be settled by this Court.

The question presented in this case deals with the administration of the AFDC

program which is administered in all fifty states. Petitioners recognize that in addition to the court below, this issue has also been dealt with in two other circuits wherein similar conclusions were reached. Riddick v. D'Elia, 626 F.2d 1084 (2nd Cir. 1980); Snider, et al. v. Creasy, et al., No. 82-3731 (6th Cir. March 1, 1984). However, in neither the case below nor the other two circuits was the Secretary of HHS a party and only in the case below was the Secretary's opinion presented to the court.

Since the Secretary was not a party to any of these actions, the Secretary is free to ignore decisions of these courts and to continue to interpret her policy permitting the practice contrary to the opinions of the three circuits until this issue is finally resolved by this Court. Those states which were not a party to these actions now face the dilemma of following the Secretary's

interpretation or the interpretation of the circuit courts.

To allow for the efficient administration of the AFDC program, and to avoid further litigation between states not now enjoined and recipients and to avoid litigation between the states and the Secretary, this Court should finally decide the question presented.

II.

The court below has decided the question presented in a way which conflicts with a previous decision of this Court.

The question presented involves the concept of deeming. This is where income is considered to an individual whether or not that income or money is actually paid. It is the position of Petitioners that 45 CFR Section 233.20(a)(3)(vi) makes the income available to a parent available to children

under 21 and that Social Security benefits paid to a representative payee are available to the beneficiary parent's dependents under 20 CFR Section 404.2040(c). Petitioners may consider this income available even though the representative payee has the discretion to determine the beneficiary's maintenance needs. 20 CFR Section 404.2035. Petitioners may consider this as income since it is available for the dependent child's support under 45 CFR Section 233.20(a)(3)(ii)(D).

The court below, however, held that this deeming procedure "creates an irrebuttable presumption that the representative payee will make available the OASDI payments for the support of the beneficiary's child." The court below went on to conclude that the presumption unlawfully restricted the discretion of the representative payee. While the court below does not say so, this could only mean that the court considered

that the income was not available under 45 CFR 233.20(a)(3)(ii)(D).

The court below, though it was raised by Petitioners before that court, does not address the effects of this Court's opinion in Schweiker v. Gray Panthers, 453 U.S. 34 (1981).

The concept of "deeming" income or assuming its availability in public assistance programs has been strongly upheld in Gray Panthers, supra. In imputing a spouse's income to an institutionalized medicaid applicant, this Court in Gray Panthers held that available resources were different from those in hand.

> We think that the requirement of availability refers to resources left to a couple after the spouse has deducted a sum on which to live. It does not, as respondent argues, permit the State only to consider the resources actually paid by the spouse to the applicant . . . . The administration of public assistance based on the

> use of a formula is not inherently arbitrary.

Schweiker v. Gray Panthers, supra at 48.

This reasoning would justify the consideration of OASDI benefits of a mother, over and above the standard of need for meeting her own needs, as income available for her dependent child. Under this Court's reasoning in Gray Panthers, the OASDI benefits need not be actually spent on the dependent child. The OASDI benefits must only be an actual source of income, which they are here, to be considered available. For these reasons, the circuit court's reasoning as regards its holding that OASDI benefits paid to a representative payee on behalf of a minor mother may not be considered available to her child for purposes of AFDC eligibility and grant amount absent actual contributions to the child is incorrect.

An assumption that all or a portion of a parent's OASDI benefits are available for the children is clearly a reasonable one in light of the fact that any other AFDC family unit of the same size, but without a representative payee, in the State of Missouri, would be receiving a grant based on the standard of need. Thus, if appellees received OASDI benefits directly, the AFDC benefits of their children would have been reduced or denied as they were here. It would be reasonable to grant one AFDC family more assistance for the sole reason that its OASDI benefits are received by a representative payee while another AFDC family receives OASDI benefits directly. To shield the OASDI income in this manner would be to encourage OASDI recipients to request receipt of their benefits through a representative payee and possibly to invite a civil action, based on the Equal Protection

clause, from an AFDC family where the mother directly receives her OASDI benefits.

The court below further disregarded this court's decision in Gray Panthers by failing to give due deference to the Secretary's opinion as to the interpretation of her own regulation. As this Court noted, because of the byzantine construction of the Social Security Act, Congress has conferred upon the Secretary exceptionally strong authority to prescribe regulations, and because of this grant of authority, the Secretary's interpretations were entitled to greater weight than in normal circumstances. Particularly in the question presented in this case, the Secretary's interpretations of her own seemingly conflicting regulations involving two separate programs, OASDI which is directly administered by the Secretary and AFDC, the operation of which is supervised by the Secretary, deference must be given to the

Secretary's interpretation to allow for the efficient administration of these various programs and the proper allocation of limited public funds among various publicly financed programs.

CONCLUSION

WHEREFORE, for the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 83-1820

Lucinda Cunningham, through her next friend, Isabel Conner, individually and on behalf of all others similarly situated,	)	
Appellee,	)	Appeal from the United States District Court for the Western District of Missouri
v.	)	
BARRETT TOAN, Director, Missouri Department of Social Services and JAMES MOODY, Director, Missouri Division of Family Services,	)	
Appellants.	)	

Submitted: December 16, 1983

Filed: March 1, 1984

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellants, public officials responsible for the administration of the Aid to Families with Dependent Children (AFDC) program in Missouri, appeal from a final order entered in the District Court[1] for the Western District of Missouri granting appellee's motion for summary judgment and permanently enjoining the state's practice of automatically regarding a minor parent's Old Age, Survivor and Disability Insurance (OASDI) benefits, paid to a representative payee, as income available to the minor parent's dependent child in determining the dependent child's eligibility and grant amount under the state's AFDC program. The named appellee and members of the class she represents are minor parents who were receiving OASDI benefits through a representative payee when they applied for AFDC benefits. For reversal appellants argue that the district court

erred in (1) entering its judgment on the basis of appellee's motion for summary judgment and (2) holding that the state practice was in conflict with regulations promulgated under the Social Security Act, 42 U.S.C. § 401 et seq. (1976 & Supp. V 1981), and therefore invalid under the supremacy clause. For the reasons set forth below, we affirm the judgment of the district court.

At the time of filing, appellee was a fifteen-year-old recipient of OASDI benefits which were based on the earnings record of her disabled father. A representative payee was receiving these benefits on behalf of appellee when appellee applied to the state for an AFDC grant for her dependent son. The Missouri Department of Social Services considered the OASDI benefits as income to the family unit consisting of appellee and her son in calculating the AFDC grant amount for the unit. Appellee contended that she

should have been excluded from the AFDC assistance unit and that in determining eligibility and grant amount for her son, only the OASDI benefits actually used to meet his needs should have been counted. After an administrative hearing, the initial AFDC grant calculation was affirmed.

Appellee brought this class action under 42 U.S.C. § 1983 for declaratory and injunctive relief alleging that Missouri's policy of counting OASDI benefits paid to a representative payee on behalf of a mother of a dependent child as income to that child when determining AFDC eligibility and grant amount conflicted with federal regulations governing the conduct of representative payees and violated the equal protection clause of the fourteenth amendment. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(3). The district court decided the statutory claim in favor of appellee and

therefore did not reach the constitutional claim.

AFDC is a joint federal and state benefit program established by the Social Security Act, 42 U.S.C. §§ 601-615, designed to provide financial assistance to needy dependent children and the parents and relatives who live with and care for them. A principal purpose of the program is to help such parents and relatives "attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." Id. § 601. The program is based on financial need. Dependent children are eligible for a grant if their income and resources are less than a set minimum subsistence level. In addition, to qualify for AFDC benefits, the children must be deprived of parental support because of the absence or incapacity of a parent and live in the home

of the other parent or a relative. Id. § 606(a)(1). If the caretaker parent or relative is also needy, he or she can be added to the grant. Id. § 601(b).

AFDC is financed in large measure by the federal government. The program, however, is administered by the participating states which are given broad discretion in determining both the standard of need and the level of benefits. Shea v. Vialpando, 416 U.S. 251, 253 (1974); King v. Smith, 392 U.S. 309, 316 (1968); Johnson v. Litkins, 568 F.2d 79, 81 (8th Cir. 1977). Participation by a given state in the AFDC program is voluntary, but if a state does participate, its plan must comply with the requirements of the Social Security Act and regulations promulgated thereunder. King v. Smith, 392 U.S. at 317; McCoog v. Hegstom, 690 F.2d 1280, 1284 (9th Cir. 1982).

In determining the need of a child for AFDC benefits, a state must consider the "income and resources of the child." 42 U.S.C. § 602(a)(7)(A). Federal AFDC regulations provide that "net income . . . and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D) (1982). The federal regulations also provide that in family groups living together, income of a parent is considered or deemed available for minor children. Id. § 233.20(a)(3)(vi).

We hold that the policy of deeming income of a parent as available to his or her minor children is invalid when the income is OASDI benefits received by a representative

payee on behalf of the parent, because such a policy is in direct conflict with the federal statutes and regulations governing the conduct of representative payees. Title 20 C.F.R. § 404.2035 (1983)[2] provides that a representative payee "has the responsibility to use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purpose he or she determines . . . to be in the best interests of the beneficiary." Failure to use the payments in this manner can expose the representative payee to criminal liability for conversion. 42 U.S.C. § 408(e); 20 C.F.R. § 404.2041. Missouri's deeming procedure creates an irrebuttable presumption that the representative payee will make available the OASDI payments for the support of the beneficiary's child. That presumption is contrary to the representative payee's legal obligation to the beneficiary and

unlawfully restricts the discretion of the representative payee in applying the benefits.

Appellants argue that there is no conflict between the state procedure and the OASDI regulations, noting 20 C.F.R. § 404.2040(c) which provides that a representative payee may use part of the OASDI benefits for the support of the beneficiary's legally dependent child if the current maintenance needs of the beneficiary are met. We fail to see the logic in this argument. The authority granted to the representative payee to use benefits for the support of legal dependents is directed to the representative payee's discretion, acting as a fiduciary of the beneficiary. A state policy which removes from the representative payee the determination of when a beneficiary's maintenance needs have been met, as well as the determination of what use of any surplus

would be in the beneficiary's best interest, is clearly inconsistent with that discretion. The fact that a certain use is permitted does not allow a state to make such use obligatory.

Our holding is a narrow one and only applies to parents receiving OASDI benefits through a representative payee when they apply for an AFDC grant for their dependent children. Furthermore, to the extent that the OASDI benefits are actually available to the dependent child, the state may consider them in calculating the child's eligibility and grant amount.

Those courts which have had the opportunity to consider state AFDC "deeming" procedures as they relate to a parent's OASDI benefits paid to a representative payee have all applied a similar analysis and have enjoined the procedure. See Riddick v. D'Elia, 626 F.2d 1084 (2d Cir. 1980); Snider

v. Creasy, 548 F.Supp. 601 (S.D. Ohio 1982), appeal docketed, No. 82-3731 (6th Cir. argued Oct. 11, 1983); Barnes v. Reagen, 501 F. Supp. 215 (N.D. Iowa 1980); Griffith v. Burns, No. C77-2012 (N.D. Iowa Nov. 9, 1977). See also Johnson v. Harder, 383 F. Supp. 174 (D. Conn. 1974), aff'd, 512 F.2d 1189 (2d Cir.) (state AFDC regulation providing that OASDI benefits received by a child through a representative payee may be included as income to legally dependent parent for purposes of determining parent's eligibility and grant amount is in conflict with federal regulations on representative payee's responsibilities and discretion), cert. denied, 423 U.S. 876 (1975).

Summary Judgment

Appellants argued in their brief that the district court erred in entering its order based on appellee's motion for summary judgment because there is a question

regarding the position of the Secretary of the Department of Health and Human Services (HHS) on the validity of the state's practice. Appellants characterized this question as a genuine issue as to a material fact precluding summary judgment under Fed. R. Civ. P. 56(c). As appellants conceded at oral argument, however, the case before the district court raised only questions of law. There was no factual dispute as to HHS's interpretation of its regulations, and the weight to be given this interpretation is a matter of law. Disposition of the case on appellee's motion for summary judgment was therefore appropriated.

Deference Due HHS's Interpretation

The Secretary of HHS has submitted an amicus brief in this case taking the position that the district court misinterpreted the statutory and regulatory obligations of representative payees in administering OASDI

benefits, and that it is permissible for a state to utilize its AFDC standard of need to determine what part of OASDI payments will satisfy a beneficiary's maintenance needs and to conclusively attribute the remainder as income available to the beneficiary's dependent child.

An agency's interpretation of its own regulations is entitled to deference by the courts, but an agency's interpretations are not conclusive and courts are not bound by them. White Industries, Inc. v. FAA, 692 F.2d 532, 534 (8th Cir. 1982); McGoog v. Hegstrom, 690 F.2d at 1284. In the present case, the Secretary's interpretation of 20 C.F.R. §§ 404.2035, .2040 is inconsistent with the language and spirit of the regulations which carefully set out the fiduciary responsibilities of a representative payee and clearly envision that the representative payee's discretion should be exercised

freely. See Johnson v. Harder, 383 F. Supp. at 179-80. We hold, therefore, that our deference does not require acquiescence in the Secretary's approval of Missouri's practice challenged in this case.

The district court was correct in holding that the state practice conflicted with federal law and was therefore invalid. Accordingly, we affirm the order and judgment of the district court.

ENDNOTES

[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[2] Formerly 20 C.F.R. § 404.2003 (1982).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Lucinda Cunningham, through her next friend, Isabel Conner, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No.
BARRETT TOAN, Director, Missouri Department of Social Services and JAMES MOODY, Director, Missouri Division of Family Services,	)	81-4233-CV-C-5
Defendants.	)	

ORDER AND MEMORANDUM

I. Nature of the Case and Prior Proceedings

On August 20, 1981, Lucinda Cunningham applied for benefits to the Missouri Division of Family Services (MDFS) for Aid to Families with Dependent Children (AFDC). The plaintiff, who was sixteen years old, received an AFDC grant of $21 per month. When the MDFS

calculated the AFDC grant, it included Social Security benefits paid to the plaintiff's representative payee as income available to the plaintiff's child. By including the plaintiff's Social Security benefits as income, the AFDC grant was reduced from $104 per month to $21 per month.

On September 11, 1981, the plaintiff requested an administrative hearing to contest the AFDC grant on the ground that the MDFS improperly counted Social Security benefits paid to plaintiff's representative as income available to her child. On October 16, 1981, a hearing decision affirmed the MDFS grant of $21.

On December 16, 1981, this Court preliminarily enjoined defendants from counting plaintiff's Social Security benefits paid to her representative when calculating the plaintiff's AFDC eligibility and grant amount, except to the extent that these

benefits were actually applied to the child's needs. The Court reasoned that it was an unlawful restriction on the discretion of the representative payee to automatically presume that Social Security benefits were available to the minor's dependent child.

On December 15, 1982, the plaintiff sought class certification for 172 other AFDC mothers below the age of 18 who receive (through a representative payee) Social Security benefits and AFDC. Class certification was granted on March 24, 1983.

DECISION

The AFDC program is a joint federal and state undertaking operated pursuant to Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq. and the implementing regulations, 45 C.F.R. § 201.0 et seq.

The issue in this case is whether Social Security benefits paid to a representative

payee on behalf of a minor beneficiary is income actually available to the minor's dependent child when calculating an AFDC grant. It is the holding of this Court that Social Security benefits paid to representative payees are not automatically considered income available for purposes of the AFDC grant. This conclusion is clearly supported by the regulations.

Federal regulations provide that income must be "actually available" to a dependent child before such income can be counted when calculating AFDC grants. Regulation 45 C.F.R. § 233.20(a)(3)(ii)(D) states:

> . . income and resources are considered available both when actually available and when applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sums available for support and maintenance. (emphasis added.)

Federal Social Security regulation 20 C.F.R. § 404.2003 states:

> A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall... apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest. (emphasis added.)

Social Security regulation 20 C.F.R. § 404.2007 states:

> If current maintenance needs of a beneficiary are being reasonably met, a . . . representative payee on behalf of the beneficiary may use part of the payments . . . for the support of the . . . legally dependent child. . . (emphasis added.)

A representative payee under 42 U.S.C. § 408(e) will be held criminally liable if he:

> . . . knowingly and willfully converts such a payment . . . to a use other than for the use and benefit of such other person.

The defendant's inclusion of Social Security benefits in calculating the AFDC

grant creates an improper irrebuttable presumption that benefits paid to a beneficiary's representative payee are automatically available to her dependent child. This presumption ignores the regulations. The regulations require a representative payee to apply benefits for the "use and benefit of such beneficiary"[1] and in the beneficiary's "best interest."[2] Nothing in the regulations indicate that Social Security payments to a representative are payments "actually available"[3] for support of the beneficiary's dependent child.

The representative payee has a duty to use payments received for the use and benefit of the beneficiary. The representative payee would violate the regulations and face criminal liability under 42 US.C. § 408(e) if he automatically used payments to support the beneficiary's dependent child.[4] The representative has a duty to use the Social

Security payments in the beneficiary's best interest, not the dependent child's best interest. The beneficiary has no "legal interest in a liquidated sum"[5] since the representative payee retains all control over the disbursement of funds. The mere fact that a representative payee under 20 C.F.R. 404.2007 "may" use payments in support of the beneficiary's dependent child does not change the fact that the beneficiary has no "legal interest" in that income for AFDC purposes.[6]

Defendants raise the possibility that a beneficiary age 16 to 18 can have benefits paid directly to them under certain circumstances. Section 00502.005 of the Social Security Policy of determining the need for a representative payee states:

> "A beneficiary under 18 is deemed to be incapable of managing his benefits, and a representative payee will usually be appointed to receive any benefits on his behalf. However, a beneficiary

> age 16 or over may be paid directly if this will serve his best interests provided he does not have a legal guardian . . and:
>
> c). He is a parent and files for himself and for his child and has experience in handling his own affairs.

Clearly, if a beneficiary receives direct payment, it is considered "available income." However, the members of the class are not receiving direct payment. Just because a policy provides for direct payment in certain limited circumstances, does not give that beneficiary a present "legal interest."[7]

Defendants' practice of offsetting AFDC benefits by Social Security payments received by a representative is inconsistent with the Social Security Act and its regulations. A representative payee under 20 C.F.R. § 404.2003 has a duty to apply benefits solely for the benefit of beneficiary and no one

else. The representative under 20 C.F.R. § 404.2007 "may" use Social Security benefits to support the minor's dependent child only if the beneficiary's needs are reasonably met. If the representative violates his duty to the beneficiary, he will be criminally liable under 42 U.S.C. § 408(e). The only way a Social Security benefit can be used to offset AFDC benefits for a dependent child is when those benefits are, under 45 C.F.R. § 233.20(a)(3)(ii)(D), "actually available" to the applicant or where the applicant has a "legal interest" in those benefits. Clearly, the representative has the legal interest" in those benefits and can only apply them for the use and benefit of the minor beneficiary. Since the minor beneficiary has no "legal interest" in the benefits, those payments to the representative payee cannot be used to offset the AFDC grant.

Since defendants' actions are inconsistent with Social Security Act, they are invalid under the supremacy clause.

It is, therefore,

ORDERED that defendants and their officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with them, are hereby enjoined from counting plaintiff's Social Security benefits paid to a representative payee as available income to plaintiff's dependent children when determining AFDC eligibility and grant amount, except to the extent that those Social Security benefits are actually applied to the needs to fit of the dependent child.

Scott O. Wright
United States District
Judge

April 25, 1983

ENDNOTES

[1] 20 C.F.R. 2003

[2] Id.

[3] 45 C.F.R. § 233.20(a)(3)(ii)(D).

[4] See, Riddick v. O'Elia, 626 F.2d 1084, 1089 (2nd Cir. 1980); Barnes v. Reagan, 501 F. Supp. 215 (E.D. Iowa 1980).

[5] 45 C.F.R. § 233.20(a)(3)(ii)(D).

[6] Id.

[7] In a hearing before this Court an official from Social Security stated that during the last three years she had been asked 8-10 times to pay directly to an AFDC minor. She allowed direct payment to a beneficiary only once. Receipt of direct payment is discretionary and not in the control of the beneficiary. Clearly, direct payment is contingent on agency approval and is not a "legal interest" held by the beneficiary.

Supreme Court, U.S.
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(3)

No. 83-1963

IN THE UNITED STATES SUPREME COURT

October Term, 1983

Barrett Toan, Director, Missouri Department of Social Services, and James Moody, Director, Missouri Division of Family Services,

Petitioners,

vs.

Lucinda Cunningham, through her next friend Isabel Conner, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Respondent's Brief In Opposition

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No. 83-1963

IN THE UNITED STATES SUPREME COURT

October Term, 1983

Barrett Toan, Director, Missouri Department of Social Services, and James Moody, Director, Missouri Division of Family Services,

Petitioners,

vs.

Lucinda Cunningham, through her next friend Isabel Conner, individually and on behalf of all others similarly situated,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This Brief of Respondent Lucinda Cunningham is in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed on May 30, 1984, by petitioners Barrett Toan and James Moody.

OPINIONS BELOW

The opinion of the District Court, reproduced in Petitioner's Appendix A, is not reported. The opinion of the Court of Appeals is reported at 728 F.2d 1101 (8th Cir. 1984).

REGULATIONS INVOLVED

This case involves federal regulations governing the conduct of representative payees of Social Security benefits, 20 C.F.R. §§404.2035, 404.2040.

20 C.F.R. §404.2035 provides in relevant part:

> A representative payee has a responsibility to -
>
> (a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary.

20 C.F.R. §404.2040 states in relevant part:

> (a) Current maintenance. We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current

maintenance. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

(b) . . .

(C) Support of legal dependents. If the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent spouse, child, and/or parent.

This case also involves federal regualtions governing the Aid to Families with Dependent Children (hereinafter, "AFDC") program, 45 C.F.R. §233.20(a)(3).

45 C.F.R. §233.20(a)(3) provides in relevant parts:

(ii)(D) Net income, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance . . .

and

(vi) . . . In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21, except that, under the AFDC plan, if a spouse or parent is receiving SSI benefits under Title XVI, then, for the period for which such benefits are received, his income and resources shall not be counted as income and resources available to the AFDC unit . . .

STATEMENT OF THE CASE

Plaintiff Lucinda Cunningham filed this case, individually and on behalf of all others similarly situated, on November 3, 1981, in the United States District Court for the Western District of Missouri. The defendants are the state officials responsible for administering the AFDC program in Missouri. Plaintiff alleged in her complaint that defendants' policy of automatically counting a minor parent's Social Security benefits paid to a representative payee as income to that parent's dependent child when determining AFDC eligibility and grant amount violated federal regulations and was thus invalid under the Supremacy Clause of the United States Constitution.

On December 16, 1981, the district court issued a preliminary injunction on behalf of the named plaintiff, enjoining defendants from counting plaintiff's Social Security benefits paid to a representative payee as income to her dependent son, except to the extent that those Soial Security benefits were actually applied to his needs.

On March 24, 1983, the district court certified plaintiff's proposed class. The class consists of all minor parents in the State of Missouri whose AFDC benefits have been or will be reduced, denied, or terminated because of defendants' policy of automatically counting Social Security benefits of a minor parent paid to a representative payee as income to the minor parent's dependent child when determining AFDC eligibility and grant amount.

On April 25, 1983, the district court entered its final judgment for plaintiff and her class and permanently enjoined defendants from counting a minor parent's Social Security benefits paid to a representative payee as income to a dependent child when determining AFDC eligibility and grant amount, except to the extent that those Social Security benefits are actually applied to the needs of the dependent child. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court on March 1, 1984.

Defendants' former policy, which was enjoined by the district court, worked in the following manner for a family consisting of a dependent child and a minor parent with Social Security benefits paid to a representative payee. First, defendant automatically counted the Social Security benefits of a minor parent paid to a representative payee as income to a dependent child regardless of whether the representative payee applied any of the parent's benefits to the needs of the child. Next, the entire amount of the Social Security benefits was compared to the AFDC standard of need for a two person assistance group in order to determine eligibility. Then, the Social Security benefits were subtracted from the AFDC payment level in order to calculate the grant amount. Under this policy, it was irrelevant whether the representative payee spent most or all of the Social Security benefits on the needs of the minor parent.

The fact situation of the named plaintiff illustrates how defendants' policy was applied.

Plaintiff Lucinda Cunningham was a fifteen year old beneficiary of $183.10 in Social Security benefits. Because she was a minor, the Social Security Administration paid these benefits to a representative payee. Plaintiff filed an application for AFDC benefits with the Missouri Division of Family Services (hereinafter "DFS") shortly after the birth of her son on July 13, 1981. DFS proceeded to process her application. First, DFS deemed the entire amount of plaintiff's Social Security benefits as income to both her and her dependent son.

Next, in order to determine eligibility, DFS compared the Social Security benefits to the AFDC standard of need for a two person assistance group. Then, DFS substracted the Social Security benefits from the AFDC payment level in order to calculate the AFDC grant amount of $21.00 per month.

Plaintiff Lucinda Cunningham subsequently filed this action seeking injunctive relief. On December 16, 1981, the district court issued a preliminary injunction enjoining defendants from counting plaintiff's Social Security benefits paid to a representative payee as income to her dependent son when calculating his AFDC eligibility and grant amount except to the extent that those Social Security benefits were actually applied to his needs. The Court reasoned that defendants had unlawfully restricted the discretion of the representative payee of plaintiff's Social Security benefits by automatically presuming that those benefits were actually available as income to plaintiff's son. The Court concluded that in order to avoid unlawfully restricting the discretion of the representative payee, defendants must allow plaintiff to exclude herself from the AFDC assistance group and determine her son's AFDC eligibility and grant amount based solely on the amount of plaintiff's Social Security benefits which were actually available to her son's needs. Since, at that time, the maximum AFDC grant for one person was $115 per month, and the representative payee actually applied $11 per month of plaintiff's Social Security benefits to the son's needs, the Court found that plaintiff was entitled to the difference between these two figures of $104 per month in AFDC benefits. Thus, in the named plaintiff's case the effect of defendants' policy was to reduce her AFDC benefits from $104 per month to $21 per month. Defendants' policy affected the unnamed members of plaintiff's class in a similar manner until the district court issued its permanent injunction.

ARGUMENT

I

The Court Of Appeals Decision Correctly Holds That Social Security Benefits Of A Minor Parent Paid To A Representative Payee May Not Be Deemed As Income To A Dependent Child For The Purpose Of Determining AFDC Eligibility And Grant Amount.

AFDC is a joint federal and state program established by the Social Security Act, 42 U.S.C. §§601-615, designed to provide financial assistance to needy dependent children and the parents and relatives who care for them. The

program is based on financial need. Dependent children are eligible for a grant if their income and resources are less than a minium subsistence level. In addition, to qualify for AFDC benefits, the children must be deprived of the parental support of at least one parent due to absence or incapacity. If the caretaker parent or relative with whom the children live is also needy, then he or she can be added to the grant.

Although the AFDC program is financed primarily by the federal government, the program is administered by the participating states. In return for receiving federal financial assistance, states must operate their AFDC programs in compliance with the Social Security Act and regulations promulgated thereunder, King v. Smith, 392 U.S. 309, 317 (1968).

The present case involves the State of Missouri's policy of deeming income when determining AFDC eligibility and grant amount. In previous cases, this Court has repeatedly held that income may not be counted under the AFDC program unless that income is actually available to meet the needs of the AFDC applicant or recipient, King v. Smith, supra; Van Lure v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970). The concept of actual availability is codified in the federal regulations governing the AFDC program, 45 C.F.R. §233.20(a)(3)(ii)(D).

In the present case, defendants' policy of deeming Social Security benefits of a minor parent paid to a representative payee as income to a dependent child violates the requirement of actual availability of income set forth in the federal regulations. The benefits are not actually available to a dependent child because the representative payee is required by law to apply the Social Security benefits to the use and benefit of the minor parent, 20 C.F.R. §404.2035. Failure to apply the benefits to the needs of the minor parent subjects the representative payee to criminal prosecution under 42 U.S.C. §408(e). Since these Social Security benefits are not actually available to a dependent child, defendants may not deem them as income to the child when determining AFDC eligbility and grant amount.

The two other Circuits which have considered the issue presented by this case have also ruled that the policy followed by defendants here violates federal regulations and is therefore invalid under the Supremacy Clause of the United States Constitution.

In Riddick v. D'Elia, 626 F.2d 1084 (2d Cir. 1980), the Second Circuit was faced with a nearly identical factual situation. In Riddick, the AFDC benefits of a mentally-disabled mother were reduced because the New York Department of Social Services deemed her Social Security benefits paid to a representative payee as income to her dependent child when calculating the amount of her AFDC grant. The undisputed evidence showed that the representative payee applied the mother's Social Security benefits solely to the needs of the mother. The Second Circuit held that the state agency's policy of automatically presuming that a parent's Social Security benefits paid to a representative payee are actually available as income to a dependent child unlawfully interfered with the broad discretion conferred upon representative payees by 20 C.F.R. §404.2035. For this reason, the Court of Appeals ruled that the state agency's policy was invalid under the Supremacy Clause.

The same result was reached by the Sixth Circuit, which was presented with a factual situation identical to the instant case, Snider v. Creasy, 728 F.2d 369 (6th Cir. 1984). In Snider, the named plaintiffs were minor mothers whose AFDC benefits were reduced or denied because the Ohio Department of Public Welfare deemed their Social Security benfeits paid to a representative payee as income to their dependent children. The Sixth C ..it ruled that Ohio's policy conflicted with federal regulations granting representative payees discretion to determine how Social Security benefits are used and with federal regulations reguiring that income must be actually available before it can be treated as income for purposes of determining AFDC eligibility and grant amount.

The decisions by the Second and Sixth Circuit are indistinguishable from the decision by the Eighth Circuit in this case. Plaintiff has been unable to find and defendants have failed to cite any case which holds that Social Security benefits paid to a representative payee may be deemed income to anyone other than the beneficiary.

II

The Court Of Appeals' Decision Does Not Conflict With Any Decisions Of This Court.

Defendants contend that the Court of Appeals' decision conflicts with this Court's decision in Schweiker v. Gray Panthers, 453 U.S. 34 (1981). There,

this Court upheld the right of a state to deem a spouse's income to a Medicaid applicant. However, Gray Panthers is readily distinguishable from the instant case because it involved payments made directly to a beneficiary, rather than payments made to a representative payee. This distinction is crucial. The Court of Appeals' decision is clearly limited to the situation in which benefits are paid to a representative payee who is required by law to apply them to the needs of the beneficiary. Since Gray Panthers did not involve this situation, the decision by the Eighth Circuit does not conflict with any decisions of this Court.

Defendants also argue that the Court of Appeals' decision conflicts with Gray Panthers because it fails to give due deference to the Secretary's interpretation of her own regulations. Again, Gray Panthers is readily distinguishable. Gray Panthers held that when the Secretary is expressly directed by Congress to define a term, the definition is entitled to "legislative effect" and must be followed unless it is arbitrary or capricious or inconsistent with the Social Security Act. In contrast, the Eighth Circuit's decision here dealt with the Secretary's interpretation of her own regulations. Such interpretations are entitled to deference or weight, but they need not be followed if they are inconsistent with the regulations, Gray Panthers at 44; United States v. Larionoff, 431 U.S. 864, 872 (1977).

Here, the Secretary filed an amicus brief which was considered and rejected by the Eighth Circuit. In that brief, the Secretary argued that Social Security benefits of a minor parent paid to a representative payee must be counted as income to a dependent child to the extent that those benefits exceed the AFDC need standard for one person. The Secretary's interpretation directly conflicts with her own regulations which grant representative payees broad discretion to determine when the needs of a Social Security beneficiary have been met, 20 C.F.R. §404.2035. Since the Secretary's interpretation is inconsistent with her own regulations, the Eighth Circuit was correct in not following it.

Conclusion

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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Certificate of Services

I, RICHARD D. CHASE, a member of the Bar of the Supreme Court of the United States, certify that pursuant to Supreme Court Rule 28.3 I served the foregoing typewritten Respondent's Brief In Opposition To Petition For Certiorari by depositing one copy thereof in a United States post office on June 21st, 1984, with postage prepaid, addressed to Mr. Robert R. Northcutt, Counsel for Petitioners, Department of Social Services, General Counsel Division, P.O. Box 1527, Jefferson City, Missouri, 65102.

Richard Chase
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No. 83-1963

In the Supreme Court of the United States

OCTOBER TERM, 1984

BARRETT TOAN, ETC., ET AL., PETITIONERS

v.

LUCINDA CUNNINGHAM, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. a. Respondents are a class of minor parents residing in Missouri who have applied for Aid to Families with Dependent Children (AFDC) on behalf of themselves and their children. Respondents also receive Old Age, Survivors and Disability Insurance (OASDI) benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, through representative payees. Pet. App. 18. A representative payee is an individual selected pursuant to statute[1] to receive

[1] 42 U.S.C. 405(j) provides:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

benefits on behalf of a beneficiary who the Secretary of Health and Human Services (the Secretary) determines "is not able to manage or direct the management of benefit payments in his or her interest." 20 C.F.R. 404.2001.

In determining the amount of the AFDC grant to a member of the class or her child, the State included the OASDI benefits as income available to the assistance unit consisting of the minor parent and her child. This had the effect of reducing the amount of the AFDC grant, which is determined by reference to the difference between the applicant's income and the applicable standard of need. Pet. App. 19, 21-23. In the case of the named representative of the respondent class, Lucinda Cunningham, the AFDC payment was approximately $80 per month less than it would have been had the OASDI benefits not been deemed available to her child (*id.* at 33).

b. Following a state administrative decision upholding the computation of her benefits, Cunningham brought this class action in the United States District Court for the Western District of Missouri against petitioners, officials of the Missouri Department of Social Services and Division of Family Services. She sought declaratory and injunctive relief, alleging that the State's deeming policy conflicted with federal regulations and violated the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 20. Although respondents conceded that OASDI benefits could properly be included in the AFDC calculation of income if they were received directly by the beneficiary, respondents argued that the benefits could not be deemed available to the child where payment was made through a representative payee.

The district court concluded that the State's policy violated federal regulations relating to the calculation of available income for purposes of AFDC and to the disposition of

funds paid to a representative payee (Pet. App. 32-41).[2] The court enjoined petitioners "from counting [respondents'] Social Security benefits paid to a representative payee as available income to [respondents'] dependent children when determining AFDC eligibility and grant amount, except to the extent that those Social Security benefits are actually applied to the needs * * * of the dependent child" (*id.* at 41).

c. The court of appeals affirmed (Pet. App. 17-30). The court concluded that the State's policy was in conflict with the federal regulations (see note 2, *supra*), reasoning that it created "an irrebuttable presumption that the representative payee will make available the OASDI payments for the support of the beneficiary's child" and that such a presumption "is contrary to the representative payee's legal obligation to the beneficiary and unlawfully restricts the discretion of the representative payee in applying the benefits" (*id.* at 24-25). Although the Secretary had submitted an amicus curiae brief in support of the State's position,[3] the court

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[2]The AFDC regulations, 45 C.F.R. 233.20(a)(3)(ii)(D) and 233.20(a)(3)(vi), provide that "income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" and that in "family groups living together, * * * income of a parent is considered available for children under 21."

The representative payee regulations, 20 C.F.R. 404.2035(a) and 404.2040(c), provide that a representative payee must "[u]se the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines * * * to be in the best interests of the beneficiary," and that "[i]f the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent * * * child."

[3]The Secretary argued that the relevant statutory and regulatory provisions required that all OASDI benefits paid on behalf of a parent be considered in determining any grant to the parent's dependent child. See note 2, *supra;* 42 U.S.C. 602(a)(3). Under these provisions, where the beneficiary's needs were judged to have been met by Missouri under

declined to follow her interpretation of the regulations (*id.* at 28-30). Neither court reached respondents' constitutional claim.

2. The issue presented in this case was recently addressed by Congress in Section 2640(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1145.[4] Section 2640(a) provides that, in making the determination of need for a dependent child, a state shall include "any income of or available for" a parent living in the same home as the child, notwithstanding the representative payee provisions of 42 U.S.C. 405(j) (see note 1, *supra*). Missouri's policy of deeming OASDI benefits paid to a representative payee available to the beneficiary's dependent child is now plainly consistent with, and indeed required by, federal law.

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its AFDC program, the State properly deemed the OASDI benefits income available to the AFDC household. See generally *Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981).

[4]Section 2640(a) of the Deficit Reduction Act of 1984 amends Section 402(a) of the Social Security Act (42 U.S.C. 602), by adding, among other things, the following requirement for state AFDC plans:

> (38) * * * [I]n making the determination [of need] under paragraph (7) with respect to a dependent child and applying paragraph (8) [with respect to the disregard of certain income], the State agency shall (except as otherwise provided in this part) include [in the assistance unit] —
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child * * * if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 U.S.C. 405(j)], in the case of benefits provided under title II) * * *.

See also 49 Fed. Reg. 35586, 35588-35589 (1984).

Although we believe that the court of appeals erred in its interpretation of prior law, its decision is of no prospective importance and accordingly does not merit review by this Court. The court of appeals' judgment, however, which affirmed an injunction contrary to federal law as it now stands,[5] should be vacated. See *Heckler* v. *Turner,* No. 83-1097 (Aug. 10, 1984) (Rehnquist, Circuit Justice). The lower courts may then proceed to consider respondents' constitutional claim, which has not yet been addressed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.* .

REX E. LEE
Solicitor General

DECEMBER 1984

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[5]The changes made by Section 2640(a) of the Deficit Reduction Act of 1984 became effective October 1, 1984. See Section 2646 of the Act, 98 Stat. 1147.